Jamaluddin bin Hashim v Public Prosecutor

HIGH COURT (ALOR SETAR) — CRIMINAL APPEAL NO 42–16 OF 1998
KN SEGARA J
14 AUGUST 1999

Criminal Law *— Rape — Girl below statutory age of consent — Whether age of victim essential ingredient in statutory rape — Duty of police investigating officer in cases of statutory rape, nature of — Penal Code s 376*

Evidence *— Documentary evidence — Identity card — Whether proof of holder's age or date of birth — Burden of proving truth of particulars in identity card — On whom such burden lies*

The appellant was charged and convicted in the sessions court with two amended charges of 'statutory rape' under s 376 of the Penal Code ('the Code'). The victim — the complainant in this case — was allegedly aged 14 years and four months at the time the offences were committed. The appellant was sentenced to eight years' imprisonment with three strokes of the 'rotan' on each charge, the sentences of imprisonment to run concurrently. The appellant appealed to the High Court against both conviction and sentence. The learned High Court judge dealt with one primary ground of appeal, which related to the issue of the complainant's age. On this issue, the defence contended that it was necessary for the prosecution to prove beyond reasonable doubt that the complainant-victim was under 16 years of age since age of the complainant-victim was an essential ingredient in the offence of 'statutory rape'. The facts revealed that no evidence was led with regard to the victim's date of birth, save that the complainant's identity card was tendered into court as an exhibit.

Held, allowing the appeal and setting aside the conviction and sentence:

(1) In cases of statutory rape, the police investigating officer has to primarily ascertain that the age of the alleged victim was in fact below 16 years of age at the time of the offence. In the instant case, however, the prosecution had failed to adduce prima facie evidence, let alone prove beyond reasonable doubt, that the victim was below 16 years of age. The police investigation officer had also failed to procure indisputable evidence of age in the form of the complainant's birth certificate (see p 5B, H).

(2) The identity card of the alleged victim cannot in law be used for proof of her age or date of her birth. There is no presumption concerning the contents of identity cards and the burden of proving the truth of any particulars therein lies on the person to whom such identity card was issued or any person alleging the truth of such contents (see p 7C–D).

Obiter:

It is common knowledge that many young girls look very mature and fully developed physically to be able to pass off, in appearance, as having attained the age of majority as well as womanhood. When there is consensual sex with such a person, it is unreasonable and unrealistic to expect a male partner to have the foresight to require his female partner to prove to him she is above 16 years of age before he entertains her (see p 5F–G).

[Bahasa Malaysia summary

Perayu telah dituduh dan disabitkan di mahkamah sesyen atas dua tuduhan pindaan 'rogol statutori' di bawah s 376 Kanun Keseksaan ('Kanun tersebut'). Mangsa — yang merupakan pengadu di dalam kes ini — dikatakan berusia 14 tahun dan empat bulan pada masa kesalahan dilakukan. Perayu telah dijatuhkan hukuman penjara lapan tahun dengan tiga sebatan rotan untuk setiap pertuduhan, hukuman-hukuman penjara berjalan serentak. Perayu telah merayu kepada Mahakamh Tinggi terhadap kedua-dua sabitan dan hukuman. Hakim Mahkamah Tinggi yang arif menimbangkan satu alasan rayuan yang utama, yang melibatkan umur pengadu. Berhubung isu ini, pihak pembela berhujah bahawa adalah perlu bagi pihak pendakwa membuktikan sehingga melampaui keraguan munasabah yang pengadu — mangsa — berumur di bawah 16 tahun oleh kerana umur adalah ramuan perlu dalam kesalahan 'rogol statutori'. Fakta-fakta menunjukkan bahawa tiada keterangan lain dikemukakan berhubung dengn umur mangsa, kecuali kad pengenalan yang dikemukakan kepada mahkamah sebagai ekshibit.

Diputuskan, membenarkan rayuan dan mengketepikan sabitan dan hukuman:

(1) Dalam kes-kes rogol statutori, adalah penting bagi pegawai polis penyiasat memastikan bahawa umur mangsa yang dikatakan adalah di bawah 16 tahun pada masa kesalahan tersebut. Bagaimanapun, dalam kes ini, pihak pendakwa telah gagal untuk mengkemukakan keterangan prima facie, apatah lagi membuktikan sehingga melampaui keraguan munasabah, yang pengadu adalah berumur di bawah 16 tahun. Pegawai polis penyiasat juga telah gagal untuk memperolehi keterangan yang tidak dapat dipertikaikan berhubung dengan umur pengadu dalam bentuk sijil kelahiran (lihat ms 5B, H).

(2) Kad pengenalan mangsa yang dikatakan tersebut tidak boleh di sisi undang-undang digunakan untuk membuktikan usia atau tarikh lahirnya. Tidak terdapat anggapan berhubung dengan apa yang terkandung dalam kad pengenalan dan beban membuktikan kebenaran sebarang butiran yang terdapat di dalamnya adalah terletak di atas sesiapa yang telah diberikan kad itu atau sesiapa yang mengatakan yang butiran tersebut adalah benar (lihat ms 7C–D).

Obiter:

Adalah dalam pengetahuan umum bahawa ramai gadis muda kelihatan matang dengan pertumbuhan fizikal yang sempurna untuk membolehkan mereka diterima, berdasarkan penampilan, sebagai mencapai usia dewasa serta peringkat kewanitaan. Apabila terdapat hubungan seks secara sukarela, adalah tidak munsabah dan tidak realistik untuk mengharapkan pasangan lelaki dikehendaki berpandangan jauh untuk meminta pasangan perempuan membuktikan yang beliau berusia lebih dari 16 tahun sebelum beliau melayannya (lihat ms 5F–G).]

Notes

For cases on rape, see 4 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1053–1072.

For cases on documentary evidence, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 688–789.

Legislation referred to

Births and Deaths Registration Act 1957 ss 32, 33

Penal Code ss 375, 376

National Registration Regulations 1990 regs 5(1), (2), 24(1), First Schedule

Karpal Singh (*Jagdeep Singh Deo* with him) (*Karpal Singh & Co*) for the applicant.

Azmi bin Ariffin (Deputy Public Prosecutor) for the respondent.

KN Segara J: The appellant ('the accused') faced two amended charges punishable under s 376 of the Penal Code for the offence of statutory rape of a girl named Suraya bte Hamzah, aged 14 years and four months. The offence in the first amended charge was alleged to have been committed on 15 August 1997 between 8pm and 12.05am and the offence in the second amended charge was alleged to have been committed on 17 August 1997 between 8 pm and 12 midnight. Both offences were alleged to have been committed at the same place, namely 5 Lorong Watt Siam, that is, at the house where the accused was then living. The accused was found guilty and convicted on both the amended charges, to which he had claimed trial, by the learned Sessions Court Judge, Alor Setar. The accused was sentenced to eight years imprisonment and three strokes of the rotan on each of the charges. The sentence of imprisonment was ordered to run concurrently. The accused was, however, released on bail by the sessions court, pending his appeal to the High Court. The accused is a government servant working with the pejabat bomba.

The alleged victim (SP3) had left her house in Pendang on 15 August 1997 for Alor Setar without her father's knowledge and when her father (SP1) could not find her that day, he had lodged a police report. However, this report was never produced in court. In Alor Setar, the alleged victim

stayed at the house of the accused from 15 August 1997 till 19 August 1997. When she returned home on the evening of 19 August 1997, she was questioned by her father and thereafter, a police report was lodged by her on 20 August 1997 at about 11.20am to the effect that she had been forced into a car by an unknown person, taken to a house, imprisoned there from 15 August 1997 till 19 August 1997 and during the said period was raped by the same unknown person. This report was also not produced by the prosecution but was instead produced by the defence, as exh D6 (see pp 44 and 156, record of appeal). It is significant to observe that her evidence in court contradicted this report (exh D6) very materially for there was never a word by her that she had been forced into a car by an unknown person, until she was confronted by the defence with the report, exh D6. Her testimony (before she was confronted with exh D6) was that she had gone to the accused's house by taking a taxi from the bus station in Alor Setar, after her arrival from Pendang. Her credibility is very much suspect—in fact, her testimony was that she had been raped several times by the accused from 15 August 1997–19 August 1997.

Was exh D6 the product of a fertile imagination manifesting the fury of a woman scorned or was she driven to make the report in order to escape from the wrath and displeasure of her father for having left the house without his permission and stayed away, thereafter, for 4 days? Was the accused the victim of circumstances manipulated by the alleged victim? The manner in which she got herself introduced and befriended the accused prior to the alleged incident and her subsequent visit and entry into the accused's house, unannounced, in the early hours of 6 February 1998, that is, at 4.15am, to wake him up from his sleep by knocking on his room door, speaks volumes about the character of the alleged victim. This visit by her took place after the accused had already been charged in court for the alleged rape. It is corroborated by the accused's police report made on 6 February 1998 at 3.10pm (see exh D10). The alleged victim's father's testimony in cross-examination:

> Suraya sekarang berada di Cheras Kuala Lumpur, Pusat Pemulihan Akhlak. Kerajaan hantar anak saya. Mahkamah Syariah hantar pada Pusat Pemulihan. (p 33, record of appeal)

is illuminating and leaves many question unanswered about the character of the alleged victim including her capability and shrewdness to achieve her desired ends.

Seventeen grounds of appeal have been set out in the petition of appeal (p 4, record of appeal) but for the purposes of a speedy disposal of this appeal before me, I was of the view it is only necessary to deal with one of the primary grounds of appeal, namely fourth ground, which reads:

> Yang Arif Pn Hakim adalah salah di sisi undang-undang di dalam tidak memutuskan bahawa di dalam kes 'statutory rape' di bawah s 376 Kanun Kesiksaan, salah satu ramuan yang perlu adalah umur pengadu, yang mana ramuan perlu ini perlu dibuktikan oleh pihak pendakwaan secara melepasi keterangan munasabah, dan di dalam kes ini tiada keterangan sebegitu, yang merupakan satu kesilapan yang memudaratkan dalam kes pendakwaan; ... .

Mr Karpal Singh, counsel for the appellant, readily agreed that this appeal should be argued and proceeded on this ground without abandoning his rights to proceed on all the other grounds, if necessary.

For the offence of statutory rape under s 375 of the Penal Code (punishable under s 376) an essential ingredient to be proved by the prosecution is that the victim, at the time of the offence, was under 16 years of age. In this case, the prosecution has completely failed to adduce prima facie evidence, let alone prove this ingredient beyond reasonable doubt.

All references to evidence in this judgment shall generally be limited to that touching or relating to the age of the victim.

The father of the alleged victim (SP1) gave evidence. Other than testifying that his daughter was schooling and in form two in 1997, SP1 did not testify how old his daughter was at that time. He did not even give particulars of her date of birth. It would appear that the learned DPP who was prosecuting did not also ask SP1 whether he had a copy of his daughter's birth certificate.

Suraya bte Hamzah (SP3) appears to have merely stated her aged as 15 at the time she was formally sworn as a witness. Then, at the start of her examination-in-chief, she tendered to court her identify card, which was marked as exh P5. There was neither evidence from her as to her date of birth nor was she asked to produce a copy of her birth certificate.

Insp Mariah bte Mohd Hashim (SP7) was the investigating officer of this case. The brevity of her 'evidence' is shocking, to say the least (p 89, record of appeal). All that she testified was:

> Saya adalah pegawai penyiasat dalam kes ini. [Period]!

In my opinion, it would have been the primary duty of the investigating officer, in cases of statutory rape, to ascertain that the aged of the alleged victim was in fact below 16 years. He or she must get the strongest and best evidence available on this point. It is common knowledge that many young girls these day do look very mature and fully developed physically to be able to pass off, in appearance, as having attained the aged of majority as well as womanhood. When there is consensual sex with such a person it is unreasonable and unrealistic to expect a male partner to have the foresight to require his female partner to prove to him she is above 16 years of age before he entertains her!

The investigating officer in this case ought to have had no difficulty in procuring indisputable evidence of age from either the parents of the alleged victim or the victim personally by asking for a copy of the birth certificate. In the event neither the victim nor the parents of the victim had a copy of her birth certificate, surely the parents would have known the date of birth and with such information in hand, the investigating officer could have applied for a certified copy of the birth certificate from the department responsible for the registration of births and deaths, pursuant to s 32 of the Births and Deaths Registration Act 1957, The relevant provisions of s 32 reads as follows:

Issues of Certificates of Birth and Certificates of Death

(1) Any person may apply from the Superintendent-Registrar on the prescribed form a Certificate of Birth or a Certificate of Death pertaining to any entry in the register on payment of such fees as may by prescribed.

(2) Every Certificate of Birth or Certificates of Death shall be certified under the hand of the Registrar or the Registrar-General or the Superintendent-Registrar having the custody of the register.

(3) ...

(4) When any application for a Certificate of Birth or a Certificates of Death is made in pursuance to subsection (1) the Superintendent-Registrar shall issue it unless —

(a) the particulars given in the application form are incomplete or inadequate or in his opinion inaccurate; or

(b) for any reason it appears to him that an entry found upon search cannot, with certainty, be connected with the person in respect of the registration of whose birth or death the certificate is applied for.

(5) When the Superintendent-Registrar has refused to furnish the Certificate of Birth or the Certificates of Death under this section, the applicant may in writing appeal to the Registrar-General, whose decision shall be final.

Section 33(1) of the same Act provides that the entry in the register or Certificate of Birth shall be received as evidence, and s 33(2) sets out when it shall not be received as evidence. For ease of comprehension s 33 is reproduced below:

Entry in register as evidence of birth or death

(1) Subject to the provisions of this section an entry or a Certificate of Birth or a Certificate of Death relating thereto purporting to have been duly certified under s 32(2) shall be received without further or other proof as evidence of such facts and particulars relating to such birth or death as are or were at the time of the making of such entry required by law to be set forth in such entry or certificate.

(2) An entry in a register or a Certificate of Birth or a Certificate of death relating thereto, shall not be received as evidence under this section unless —

(a) the entry purports to be signed by some person professing to be the informant and to be such a person as might be required by law at the date of the entry to give to the Registrar information concerning that birth or death; or

(b) the entry is an entry of a birth which is signed by a person professing to be a Superintendent-Registrar, or which purports to have been made with the authority of the Registrar-General; or

(c) the entry is an entry of a death which purports to have been made upon a certificate from a Coroner or Magistrate; or

(d) the entry purports to have been made in pursuance of any written law relating to the registration of births and deaths at sea or on board an aircraft, or

(e) the entry is —

(i) an entry in any register, book of record or document recording particulars of births and deaths which has been kept or

A preserved under or in accordance with the provisions of my former written law relating to the registration of births and deaths; and

(ii) such entry or a certified copy of such entry would immediately before the coming into force of this Act have been received as evidence of the facts or particulars in respect of which such entry or certified copy is produced as evidence.

B (3) For the purposes of this section Certificate of Birth or a Certificate of Death shall be deemed to be a certified copy if it purports to have been certified in accordance with s 32(2) notwithstanding that it may be —

(a) photographically reproduced; or

C (b) an extract of the information contained in the register in a form prescribed which form may be different from that in which the original entry was made.

Exhibit P5, the identity card of the alleged victim, cannot in law be used for proof of her age or her date of birth. There is no presumption concerning the contents of identity cards and the burden of proving the truth of any D particulars therein lies on the person to whom such identity card was issued or any other person alleging the truth of such contents. There is no ambiguity in reg 24(1) National Registration Regulations 1990 (PU (A) 472) which provides:

E The burden of proving the truth of the contents of any written application for registration under these Regulation, or the contents of an identity card, shall be on the applicant, or on the person to whom such identity has been issued, or on any other person alleging the truth of such contents.

Under the National Registration Regulations 1990, 'identity card' means:

F an identity card issued under regulation 5(1) and includes replacement identity card issued under regulations 13, 14, 15 and 18, an identity card issued before the coming into force of these Regulations and any temporary document of identity issued under regulation 5(5); ... .

Regulations 5(1) and 5(2) reads as follows:

G (1) The registration officer may at his direction issue to the person giving the particulars referred to the regulation 4 an identify card as prescribed in subregulation (2) of this regulation containing a copy of such person's photograph, thumb impressions and such other particulars as may be necessary for his identification.

(2) an identify card shall be in the form prescribed in the First Schedule and shall contain the particulars as prescribed in that Schedule and such other H particulars as may be necessary for the identification of the person to whom it is issued.

The particulars contained in an identity card are such particulars as are necessary for identification of the holder only. In this regard, the right and left thumb impression would be most crucial. The date of birth is patently I not a material particular relevant for identification and very correctly, therefore, the form of identity card in the First Schedule of the National Registration Regulations 1990 does not list out 'date of birth' as one of the requisite particulars either on the observe or reverse of the identity card.

The First Schedule of the National Registration Regulations 1990 is reproduced below:

First Schedule

[Regulation 5(2)]

Form Of Identity Card

The identity card will contain the following particulars:

Obverse:

1 Identity Card Number
2 Name
3 Residential Address
4 Date of Issue
5 Old Identity Card Number (if any)
6 Identity Code for native of the State of Sabah or Sarawak
7 Residential Status
8 Holder's Photographs

Reverse:

9 Signature of Director General of National Registration
10 Left thumb impression
11 Right thumb Impression.

I have called for and examined exh P5 (which was a photostat copy of the alleged victim's identity card). It is issued in conformity with reg 5(2) and the First Schedule of National Registration Regulation 1990. The date of birth of the person to whom the identity card was issued is not given either on the obverse or the reverse of exh P5. The prosecution, therefore, had not adduced prima facie evidence that the alleged victim was under 16 years of age. In the circumstances, the learned sessions court judge ought not to have called for the accused to enter his defence.

Appeal allowed. Conviction and sentence set aside.

Accused is acquitted and discharged.

Reported by Andrew Christopher Simon